UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 79-5317

United States of America, Appellee,

v.

James W. Cothran, Jr., Appellant.

NO. 79-5319

United States of America, Appellee,

v.

A. Frank Harrison, III, M.D., Appellant.

NO. 79-5326

United States of America, Appellee,

v.

James F. Johnson, Appellant.

NO. 79-5329

United States of America, Appellee,

v.

Bobby Richardson, Appellant.

United States of America, Appellee,

v.

Leon Cooper, Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia, Robert F. Chapman, District Judge.

Argued November 6, 1981

Decided June 10, 1982

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and MURNAGHAN, Circuit Judge.

Herbert W. Louthian (Thomas P. Cothran on brief) for Appellant Cothran; John R. Lester for Appellant Cooper; Daphne Sipes (J. Edward Holler on brief) for Appellant Johnson; Robert C. Elliot for Appellant Richardson; Thornton H. Brooks (George W. House on brief) for Appellant Harrison; (Mitchell Willoughby, Robert E. Kneece on brief) for Appellant

Harrison; Thomas P. Simpson, Assistant United States Attorney (Henry Dargan McMaster, United States Attorney, Marvin J. Caughman, Assistant United States Attorney, Lester L. Bates, III, Third Year Law Student on brief) for Appellee.

MURNAGHAN, Circuit Judge:

James W. Cothran, Jr., A. Frank Harrison, III, M.D., James F. Johnson, Bobby Richardson, and Leon Cooper appeal their convictions for mail fraud violations under 18 U.S.C. §1341[1] on various grounds.

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1 18 U.S.C. §1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The government proceeded at trial against the five defendants by alleging a mail fraud scheme whereby attorney Cothran would submit false or inflated insurance claims on behalf of purported automobile accident victims who in fact suffered minor injuries at all, or were not actually involved in an accident.[2] On the victim's behalf, Cothran would file relatively small claims for damages, generally basing them on neck and back, or whiplash injuries. To succeed, he needed two types of assistance: (a) runners, or a referral service, and (b) at least one phyisician.

One referral source was made up of runners, among them co-defendant Bobby Richardson, who operated out of Cothran's office, all of whom also set up wrecks.

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2 The indictment consisted of twenty counts, each of which was based upon a separate traffic accident or purported accident.

Wrecker service operators[3] and drivers[4] constituted a second source of clientele for Cothran. Also, a former Columbia, South Carolina, police officer admitted receiving several hundred dollars in bribes in return for referrals to Cothran. Johnson, too, relied upon a referral system based upon bribery of police officers.

From the physician, co-defendant A. Frank Harrison, III, Cothran needed and received curesory examinations of his clients who were diagnosed usually as suffering neck and back pain, injured or not. Harrison's medical reports predicted continuing physical problems for the accident victims in order to increase the settlement value of their claims.

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3 Such was the status of co-defendant James F. Johnson.

4 Co-defendant Leon Cooper was a tow-truck driver for Johnson's wrecker service.

Further exacerbating the doctor's role was Cothran's instruction to his clients to meet as many appointments with Harrison or other physicians as possible. Dr. Harrison complied with this tactic and billed for services even though the patients on occasion did not show up.

The requisite mailings to make out violations of the statute were proven through the testimony of insruance adjusters, who identified specific mailings by Cothran, or by insurance agents who testified that certain documents were mailed in furtherance of the scheme.

The defendants, employing an approach not infrequently encountered, now raise a plethora, amounting to twenty, of separate arguments why their convictions should be reversed and judgment entered in their favor or a new trial ordered.

I. Jury Selection

First, they contend that the trial court erred in ordering the jury venire list

sealed until the day of the trial. Extensive publicity preceded the trial on account of the number of insurance companies defrauded and the scope of the scheme alleged. Cothran and Harrison were elected members of the Richland County Council. The background of the other defendants varied. Numerous witnesses were to testify for the prosecution. In light of those facts, the defendants maintain that they should have been permitted to examine the prospective jury list so that a fair supplementation of the trial judge's voir dire questions could have been made. They assert that the interests of justice did not require the sealing of the list; that they were denied a fair and impartial trial in having no knowledge, prior to the jury selection, of the section of the community that each juror represented; that there had been inadequate time in which to determine particular voir dire questions as to each juror; and that, in sum, the decision to seal the jury list was arbitrary

and unjustified. In particular the defendants object to the lessened opportunity for them to employ the services of a psychologist retained by them to assit in assessment of prospective jurors.

The defendants have made no assertions of particular disqualifications of individual prospective jurors. A fortiori, they have set forth no such disqualifications which would not have been reasonably discoverable by the voir dire which the district court conducted. The district judge invited additional inquiries by the defendants as to particular areas of concern when, on the opening day of the trial, he unsealed the venire list and conducted voir dire.

Section 1863(b) (7) of Title 28, United States Code, vests the district court with wide discretion to keep the jury list confidential "where the interests of justice so require." In challenging action taken pursuant to section 1863(b)(7), court's decision."

United States v. Tucker, 526 F.2d 279, 283 (5th Cir. 1976), cert. denied, 425 U.S. 958 (1976); United States v. Stokes, 506 F.2d 771, 777 (5th Cir. 1975).

The district judge directed extensive voir dire questions to the prospective jurors. The court also posed additional questions that the defense counsel wished to have asked. The court expressed especial concern with the pre-trial publicity. Obviously, prospective jurors in a case with political overtones, attracting widespread public attention, may potentially be subjected to pressures detracting from their capacities to provide fair and impartial service as jurors. Certainly the defendants would have preferred to have seen the jury list earlier, but such an unfulfilled, general desire does not evidence an abuse of discretion by the trial judge. Stone v. United States, 324 F.2d 804, 806-807 (5th Cir. 1963), cert. denied, 376 U.S. 938 (1964) ("We find no error in the record, and no abuse of discretion in the

court's refusal to permit access to the jury list prior to the the day of the trial . . .").

The defendants next argued that the trial court erred in not permitting conduct of the examination of prospective jurors by the defendants on an individual and collective basis. The district judge preferred to put the voir dire questions over the manner in which voir dire is conducted. Ham v. South Carolina, 409 U.S. 524, 527 (1973). The defendants complain that their counsel were not permitted to examine the prospective jurors, but no abuse of discretion inheres in the refusal to allow counsel personally to conduct the voir dire. United States v. Duncan, 598 F.2d 839, 865 N.25 (4th Cir. 1979), cert. denied, 444 U.S. 871 (1979) ("The refusal to allow counsel to conduct that voir dire cannot be described as an abuse of that discretion.").

Neither is there any error in the trial court's refusal to inquire of each prospective juror, separately, whether he knew

any of the over two hundred prospective witnesses in the case.

Had a request been made that, for the purpose of ferreting out any personal acquaintanceships, the prospective jurors collectively hear the names on the witness list, possibly a closer question might have been presented. Then but one reading of the list, rather than a repetition of the list for each ofthe prospective jurors, would have been required. Obviously the burden on the judicial system would have been somewhat less. We do not mean, however, to suggest that there would then have been, in that case, an obligation on the district judge to read the witness list. We emphasize that a question of that nature is not before us, since the defendants did not ask for a collective presentation of the question. We merely express our conclusion that it was not an abuse of discretion to refuse on voir dire to put the entire list of over two hundred prospective witnesses

separate to each potential juror.

The defendants, in protesting the failure to inquire about personal acquaintance in the only way that they asked the district judge to prceed, do not suggest that any juror was subject to an influence which adversely affected his impartiality. Rather, the defendants assert that the court's failure to make the desired inquiry reduce the meaningfulness of the peremptory challenges available to them. It must be pointed our, however, that the trial court, at times assisted by defense counsel conducted an extensive voir dire. The questioning provided more than "some surface information tion about prospective jurors." Cf. United States v. Baldwin, 607 F.2d 1295, 1297 (9th Cir. 1979). Here the court conducted a voir dire of sufficient scope to insure that the possible prejudices of each juror were tested. Nothing in the voir dire suggests that it "was so unreasonable as to constitute an abuse of discretion." Id.

The trial court increased to fifteen (15) the number of peremptory challenges available to the defendants. The challenges were to be exercised separately, so that each defendant had three (3) challenges at his disposal. The trial court, however, went further and instructed the defense counsel that they could not collaborate on the use of the individual challenges. Indeed, he called them to task for apparently employing "a secret code" to coordinate the peremptory challenges. The government maintains that, in electing to exercise the challenges individually, the defendants forfeited any right to consultation on the matter. We cannot agree that Rule 24(b) commands such a result.

The Rule reads, in relevant part:

> If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Fed. R. Crim. P. 24(b). We read the language "separate or jointly" to mean that the final

say on whether a particular juror is to be accpeted or excused rests either with a single defendant or with all defendants collectively. In this case, a single defendant had the power to deny three prospective jurors a seat on the panel regardless of whether any of his co-defendants may have wished to seat them. The defendants selected that mode of exercising thier challenges because, in part, of possible conflicts between the types of persons they might want on the final panel. Decision as to how to exercise the peremptory challenges and exercise itself are, however, two quite different things. In making their separate decisions, the defendants probably should not have been prevented from soliciting each other's opinions or the opinions of each other's counsel. Rule 24(b) refers, however, only to entitlement to peremptory challenges, not to the manner in which entitlement is to be exercised. We believe the trial court's bar of the secret code was not a denial or impairment

of the right to challenge the jurors individually as the defendants had elected to do. Consequently, no occasion for reversal exists. See Swain v. Alabama 380 U.S. 202, 219 (1965).

The defendants next complain that the trial court failed to excuse a particular venireman for cause and that the defendants were thereby prevented from an uncontrolled use of their peremptory challenges. The prospective juror was challenged peremptorily by counsel for defendant Cothran and, consequently, was excused. Counsel for defendant Cothran used only two of his three peremptory challenges during the entire jury selection process. Thus, it is unnecessary to discuss the propriety of the trial judge's refusal to strike the juror for cause. Even were such refusal to constitute error (a matter which we have no occasion to decide, and do not decide), it would amount to only harmless error. The failure to exercise all available peremptory challenges defeats any claim of prejudice.

Hopt v. Utah, 120 U.S. 430, 436 (1887) ("Notwithstanding the peremptory challenges made by the defendant to two of the jurors, he had several such challenges which had not been used when the jury was completed. If, therefore, the ruling of the court in disallowing the challenges to the two for bias, actual or implied, was erroneous, no injury to the defendant followed."), approved in Spies v. Illinois, 123 U.S. 131, 168 (1887), and Stroud v. United States, 251, U.S. 15, 21 (1919). See United States v. Rucker, 557 F.2d 1046, 1049 (4th Cir. 1977) (". . . the defendant in that case did not use his peremptory challenges to strike the veniremen in question.").

II. Evidentiary Hearings and Rulings

The defendants' fifth allegation of error concerns the pre-trial hearing at which documents from insurance company files were identified. The defendants contend that the trial court made inconsistent and contradictory rulings as to the admissibility of evidence.

Contrary to the defendants' assertions, no document was admitted into evidence that day. The hearing was purely for the purpose of establishing custody of the documents. Defense counsel were afforded adequate time in which to view the documents. The ministerial employees who tesified were subject to cross-examination by the defense, and were subject later to subpoena by the defendant. Indeed, the trial court was quite solicitous of the defendants with regard to the documents. The defendants' complaints are unsupported by the record; the allegation of error, groundless.

Defendant Harrison has subpoenaed his secretary, Dot Raven, as a witness on his behalf. Counsel for Harrison and for the government stipulated as to what the testimony of Raven would have been, However, the trial court sustained an objection to the stipulated

testimony made by counsel for Cothran.[5] Her availability on emotional grounds to appear in person to testify was in question. Consequently, a hearing concerning Raven's emotional condition was necessitated. The defendants now complain that the hearing was held ex parte and in camera and, therefore, in a manner "which violated the fundamental due process notion of fairness to all litigants." The hearing was neither ex parte nor in camera. No due process violation occurred.

"Ex Parte means that an application is made by one party to a proceeding in the absence of the other." United States v. Meriwether, 486 F.2d 498, 506 (5th Cir. 1973), cert. denied, 417U.S. 948 (1974). Both adverse parties were present at the hearing. Only

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5 That ruling was unexceptionable, for the stipulation, not joined by Cothran, was inadmissible hearsay as to Cothran. Admitted over his objection, the stipulation would have denied Cothran the valued right of cross-examination. See Barber v. Page 390 U.S. 719, 721 (1968).

Harrison had subpoenaed Raven. He and his counsel, as well as counsel for the government, attended. In any event, a subpoena is, by its very nature, an ex parte proceeding. See Fed. R. Crim. Proc. 17. The testimony of the physician, Dr. Huggins, concerning Raven's inability to testify lasted two minutes and was taken in open court before the official court reporter. It is a misperception to characterize what happened as in camera. "A case is said to be held in camera either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom." Black's Law Dictionary, 892 (4th ed. 1957). None of the other defendants had ever subpoenaed Raven or objected to the absence of her testimony. Harrison alone assets prejudice because she did not testify and inasmuch as her stipulation was not admitted into evidence. Yet Harrison was present and represented throughout so no prejudice, ex parte or in camera, can be said

to have been suffered by him.

The defendants next asset partially toward the government by the trial judge. They ground their claim of error on a series of questions and ruling made by the court during the trial. The defendants maintain that "the cumulative effect of the conduct of the trial judge . . . was so prejudicial in favor of the government as to deprive the Appellants of a fair trial." They further asset that, through his "interference," the trial judge assumed the role of a prosecuting attorney. We have considered the charges and conclude that they border on the irresponsible and that no error has occurred. A review of the record reveals that the trial judge, in his questions and statements, was attempting to move the trial alone and to clarify the questions to and the answers by the witnesses. The trial judge "should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed

may hurt or help one side or the other." Simon v. United States, 123 D.2d 80, 83 (4th Cir. 1941), cert. denied. 314 U.S. 694 (1941); United States v. Pomponio, 563 F.2d 659, 667 (4th Cir. 1977), cert. denied, 435 U.S. 942 (1978). No badgering, no harassment, of witnesses or of the defense, occurred. Indeed, the judge conducted this trial well within the realm of judicial propriety. Defendants' seventh allegation of error must fail.

Defendant Cothran objects to the admission of the testimony of John Robert Morris, a wrecker service operator, who stated that Cothran had approached him in an attempt to persuafe him to send automobile accident victims to Cothran. Cothran seems to believe that the introduction of the testimony amounted to a trial for activities for which he had not been indicted. His entire argument focuses on the failure of the indictment to charge any complicity with the witness. The focus is misplaced.

The indictment charged that the defendants 'devised and intended to devise a scheme and artifice to defraud numerous insurance companies by causing the filing, through the use of the United States Mail, of claims on behalf of numerous persons who had allegedly been injured in automobile accidents, but who in fact suffered with very minor injuries, no injuries at all, or were not actually involved in an accident."

The allegedly objectionable testimony goes to the issue of Cothran's knowing participation in the scheme. Admission of the testimony was proper as it fits squarely within the confines of Rule 404(b) of the Federal Rules of Evidence.[6]

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6 F. R. Evid. 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In a factually similar case (involving a prosecution of a lawyer for conspiracy and mail fraud), the Eight Circuit has held that the trial court did not abuse its discretion in admitting evidence of similar criminal acts not charged in the indictment, since such evidence is relevant to the issue of the defendant's knowing participation in the scheme. United States v. Witschner, 624 F.2d 840 (8th Cir. 1980), cert. denied, 449 U.S. 994 (1980). The testimony here was properly admitted for it went to more than criminal disposition alone. It "served to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." McCormick, Evidence, Cleary ed. 1972 §190, p. 448; United States v. Masters, 622 F.2d 83, 87 (4th Cir. 1980). It was closely linked to the activities charged and was relevant on the issue of intent, motivation, preparation, and plan. United States v. Klauber, 611 F.2d 512 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980).

Government witness Gary Pearson testified that, during the investigation of the case, he was taken to Cothran's law office at gunpoint and that Cothran offered him money to leave town. Immediately upon the conclusion of Pearson's testimony, the trial judge instructed the jury that evidence tending to show consciousness of guilt was not sufficient to establish guilt. He further instructed and reminded the jury that they had heard only one side and that they should not determine guilt until they had heard the other side. Counsel for Cothran promptly moved for a mistrial on the grounds that the timing of the instruction gave the jury the improession that the burden of proof had shifted to him. The trial judge did not give a curative instruction until the following morning.[7] Cothran argues that this

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7 It read:

> So if you interpreted my instructions yesterday as creating any burden on any defendant to answer those charges, then disregard that because the burden of proof on that issue, as on every other issue in the case, remains with the United States.

instruction came too late.

Cothran does not contend that the testimony was improperly admitted. His quarrel is with the subsequent instructions. We see no error in the first instruction. The trial judge merely told the jury not to form any opinion concerning Cothran's guilt or innocence until they had heard all of the evidence. The instruction was cautionary. It did not place undue emphasis on Cothran. It did not shift the burden of proof to Cothran.

Moreover, the curative instruction given the following morning sufficed to dispel any misunderstanding which may have existed. The curative instruction took great care to make it quite clear to the jury that no shift in the burden of proof has occurred. Cothran relies heavily on the prohibition against inconsistent instructions. E.g., Perez v. United States, 297 F.2d 12 (5th Cir. 1961). The instructions, however, were consistent. The second is but a clarification of the first.

The jury was informed as to the proper burdens. There is no error. United States v. Prince, 515 F.2d 564, 567 (5th Cir. 1975), cert. denied, 423 U.S. 1032 (1975).

Cothran next complains of the testimony of two medical expert witnesses, Drs. Bradham and Ravita, called by the government. The witnesses testified as to the professional relationship between physicians and attorneys and to the friendship of Cothran and Harrison based upon the files of patients of Harrison referred by Cothran. Cothran maintains that allowance of the testimony was improper and prejudicial in that it invaded the province of the jury as factfinder. Cothran's argument ignores the existence of Rule 704 of the Federal Rules of Evidence which permits witnesses to testify as to ultimate issues of fact.[8] In

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8 Fed. R. Evid. 704 provides that: Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

any event, we need not overly concern ourselves with the questions. Pursuant to the discretion embodied in Rule 403 of the Federal Rules of Evidence,[9] the trial judge carefully limited the testimony of the physicians. Some testimony already given was struck from the record.

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9 Fed. R. Evid. 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Other testimony was the subject of a cautionary instruction.[10]

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10 Ladies and gentlemen of the jury, we have heard some testimony by Dr. Ravita about certain things that he considered unusual from his examination of these various files and medical reports, and he was qualified as a medical expert, and this type testimony I do not think is proper for the field of medical expertise, because really it gets into the field of just analyzing what is there, his testimony about the same type thing, is not in the realm of expert testimony. So, disregard all of that testimony.

Now, he can testify, as a doctor, about what he might do or would have done or what the proper treatment is, but his observations about the unusual coincidences that he says appeared in the various files, you should disregard it and I am striking that from the record.

Cothran's fourth complaint is that Counts 5[11] and 18[12] should have been struck from the indictment or a judgment of acquittal

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11 THE GRAND JURY FURTHER CHARGES THAT:

. . . .

2. That on or about the 11th day of August, 1975, in the District of South Carolina, JAMES W. COTHRAN, JR. for the purpose of executing the aforesaid scheme and artifice to defraud, did cause to be delivered by mail according to the direction thereon a letter to American Interinsurance Exchange, North Charleston, South Carolina, in violation of the provisions of Title 18, United States Code, Section 1341.

12 THE GRAND JURY FURTHER CHARGES THAT:

. . . .

2. That on or about the 5th day of April, 1976, in the District of South Carolina, JAMES W. COTHRAN, JR. and BOBBY RICHARDSON, for the purpose of executing the aforesaid scheme and artifice to defraud, did cause to be delivered by mail according to the direction thereon a letter to Seibels Claims Service, an agency of South Carolina Insurance Company, Columbia, South Carolina, in violation of the provisions of Title 18, United States Code, Section 1341.

should have been entered with respect to the counts. Cothran contends that, as to Count 5, he did not cause to be mailed a letter as charged in the indictment; and that, as to County 18, no claims were made as alleged in the indictment; and that, as to both counts, no mailing was caused for the purpose of executing any schemes.

We must view the evidence in a case on appeal in a light most favorable to the government. United States v. George, 568 F.2d 1064, 1068 (4th Cir. 1978), citing Glasser v. United States, 315 U.S. 60, 80 (1942). Contrary to Cothran's assertion, sufficient evidence existed to support the allegations in Counts 5 and 18 and to convict him on the charges.

One of the theories of the government's case was that the defendants caused as many accident claims as possible to be filed. The key to making such fraud successful was to file many small claims so that the

insurance companies would settle rather than having a few large contested claims.

Concerning Count 5, Harvey Earl Kennedy, a government witness, who was a client of Cothran's, testified that Cothran gave him money to go to his insurance agency and expand the coverage of his father's insurance policy after an accident had already occurred. Almendia K. Bush, a sister of Kennedy's and a client of Cothran's, testified that Cothran told her she should claim that she was in the wreck in order to collect insurance proceeds, even though she had not been in the wreck. Consequently there was sufficient evidence to show that Cothran directed expansion of the coverage provision in the insurance policy, so that Cothran could attempt to file broader fraudulent claims.

Uncontradicted testimony at trial established that Cothran reasonably should have foreseen that a form requesting change of coverage would have been sent through the mails.

See United States v. Perkal, 530 F.2d 604, 607 (4th Cir. 1976), cert. denied, 429 U.S. 821 (1976). The insurance agency, located in Columbia, South Carolina, by custom and practice, mailed amendments of policies to its regional offices in North Charleston, South Carolina. The evidence of mailings was sufficient to submit the questions to the jury. United States v. Silvern, 494, F.2d 355, 360 (7th Cir. 1973). It does not matter that no claim was ever filed as a result of the particular accident. Success of the scheme is not a necessary element in proof of mail fraud under Section 1341. See United States v. Gaskill, 491 F.2d 981, 984 (8th Cir. 1974).

Count 18 involved the so-called "phantom vehicle" accident. Five persons were riding in a car driven by defendant Richardson when, without warning, it crashed into a building. One passenger testified that no other vehicle was involved, though later Richardson claimed he had been forced off the road by

another car. The following day the occupants of the car, in the company of Richardson, went to Cothran's office. Cothran instructed them to "find someone to say" he was the driver of the phantom vehicle. Cothran represented the individuals and mailed their medical bills with a cover letter to the insurance agent. Such was the mailing referred to in the indictment. No payments were ever made by the insurance company because the driver of the "phantom vehicle" never turned up. Again, the lack of success of the scheme is irrelevant to proof of the crime. United States v. Gaskill, supra.

Lastly, the mailings alleged in Counts 5 and 18 both support federal criminal jurisdiction. The mailings were a step toward receipt of the fruits of the scheme. Without increasing the coverage under Kennedy's father's insurance policy, no recovery could be had in Almendia K. Bush's name. Likewise, without filing claims for the persons in the "Phantom

vehicle" accident, no recovery could be had. The mailings were not irrelevant to the scheme or its success. Consequently, they fulfilled the statutory requirement and sustain Cothran's convictions. United States v. Maze, 414 U.S. 395 (1974); United States v. Perkal, 530 F.2d 604, 607 (4th Cir. 1976), cert. denied, 429 U.S. 821 (1976).

Defendants Cothran, Cooper, and Johnson allege error with regard to the trial judge's instruction to the jury that violations of the Code of Professional Responsibility could be considered evidence of fraudulent intent. However, the trial judge specifically told the jury that the Code was relevant only to Cothran. No other defendant was named.

Cooper argues that the inclusion of the word "also" in the charge obscured the applicability of the Code to lawyers alone. We find the assertion without merit. Prior to reading the particular code sections to the jury, the trial judge stated: "The existence

of these rules may also be considered by you as relevant to the defendant Cothran's intent to defraud, if such intent did exist." immediately previously, the trial judge had identified the Code as "governing the conduct of lawyers," "a rule of practice for lawyers", and "the standard of conduct expected of lawyers in the state". Cooper has misread the trial judge's statement. "Also" is used in the simple sense of meaning that the jury could consider the Code of Professional Responsibility in addition to all the other evidence relevant to Cothran's fraudulent intent. The jury could in no way infer that unethical conduct by Cothran might bear on the guilt of Cooper. Neither Johnson nor Cooper has cause for complaining of the instruction.[13]

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13 Counsel for Johnson did not even take exception to the charge at trial.

We already have sanctioned the application of the Code in criminal jury instructions where the defendant is an attorney. United States v. Klauber, 611 F.2d 512 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980) (member of the Maryland Bar); United States v. Reamer, 589 F. 2d 769 (4th Cir. 1978), cert. denied, 440 U.S. 980 (1979) (member of the Maryland Bar). Cothran grounds his objection to the Code instruction on the fact that, unlike South Carolina, in Maryland the Code has been adopted by statute. We see no material difference.

Under the South Carolina Constitution, the rulemaking authority concerning attorneys is vested in the South Carolina Supreme Court. S. C. Const. art. 5, §4, see In Re Primus, 436 U.S. 412 (1978). South Carolina attorneys are subject to discipline for violations of the Code. The rules are not to be treated lightly whether adopted by court action or by statute. The Code establishes the standard of conduct for attorneys in South Carolina. As such, it is

"relevant to the attitude [Cothran], as a member of the Bar, should have maintained toward the practices that were proven." See United States v. Klauber, 611 F.2d at 520; United States v. Rabbitt, 583 F.2d 1014, 1029 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979)

III. Cooper's Conviction

Defendant Cooper was convicted of Counts 13, 14 and 16 of the indictment. "Anyone who 'knowingly and intentionally' participates in the execution of the fraudulent scheme comes within the prohibition of the statute . . . whether the indictment charges a conspiracy or not". United States v. Perkal, 530 F.2d 604, 606 (4th Cir. 1976), cert. denied, 429 U.S. 821 (1976) (citations omitted). The prosecution alleged three facts to prove Cooper's awareness of the scheme to defraud: (1) the referral of two clients to Cothran; (2) Cooper's receipt of various loans from Cothran; and (3) Cothran's handling of an autmobile accident claim for Cooper. While such circumstantial facts may be

used to prove guilt, the circumstances proved and the inferences which can reasonably be drawn therefrom must tend to show that the defendant is guilty beyond a reasonable doubt. United States v. Stroupe, 538 F.2d 1063, 1066 (4th Cir. 1951), cert. denied, 340 U.S. 930 (1951). It is true that every reasonable hypothesis consistent with innocence need not be excluded. United States v. Mankins, 497 F.2d 1265, 1267 (4th Cir. 1974), cert. denied, 419 U.S. 899 (1974). Nevertheless, there must be substantial evidence upon which the "jury might justifiably find the defendant guilty beyond a reasonable doubt." United States v. Chappell, 353 F.2d 740, 748 (4th Cir. 1960), cert. denied, 364 U.S. 850 (1960) (emphasis in original). See also United States v. Glasser, 315 U.S. 60, 80 (1942); United States v. Sherman, 421 F.2d 198, 199 (4th Cir. 1970), cert. denied, 398 U.S. 914 (1970). We reverse here because the evidence, viewed in the light most favorable to the government, simply is insufficient to

support the jury finding that Cooper had knowledge of the scheme.

Cooper was an employee of Johnson's wrecker service removed in both the phsycial sense, because he was usually out on the road, and the organizational sense, because of his status, from managerial decisions. Cooper was in no position to know of any managerial decision made by Johnson to engage in a fraudulent scheme with Cothran. There is nothing to indicate that Cooper heard or saw anything which would have tipped him to the existence of the scheme. Compare United States v. Grow, 394 F.2d 182 (4th Cir. 1968), cert. denied, 393 U.S. 840 (1968) (defendant occupied managerial position and inference of guilty knowledge was permissible because of volume of information on corporate operations available to him), and United States v. Mortimer, 118 F.2d 266 (2d

Cir. 1941), cert. denied, 314 U.S. 616 (1941) (defendant in active charge of the company's business so that inference justified that he was aware of customary practices or conditions of general significance), with United States v. Franklin, 608 F.2d 241 (6th Cir. 1979) (although defendant was the intermediary in a loan transaction which constituted misapplication of bank funds, no evidence existed to suggest his familiarity with or even remote awareness of any of the facts surrounding the loan application or its processing), and United States v. Pearlstein, 576 F.2d 531 (3d Cir. 1978) (salesmen in no position to know of fraudulent scheme devised by the corporate management).

Cooper's personal contacts with Cothran likewise do nothing to brand Cooper as a knowing member of the illicit scheme. The contacts were sporadic and strictly confined to an attorney-client relationship; any loans made by Cothran to Cooper were fully repaid; and

Cooper's autmobile claim was bona fide and is unlinked on its face to the scheme to defraud the insurance companies.

Of the two referrals which Cooper made to Cothran, the first was of Ronnie Portee, to whom Cooper was a "dutch uncle." They had known each other for many years and were members of the same "family". Cooper only accompanied Portee and his mother to Cothran's office at the mother's insistence, and after making introductions Cooper left. The second referral was of Hercules Pauling. The Paulings were from out of town and knew no attorneys in the area. Cooper referred Pauling to Cothran because Cothran had previously represented Cooper and Cooper had been pleased with Cothran's work. Cooper was not aware that the Paulings had seen Cothran until he ran into Mr. Pauling later at a fast food store where Cooper was employed. The referrals are archtypically of the type which one hopes a satisfied client or customer will send one's way. They have nothing inherently

improper, or even unusual, about them. That Cothran may have seized the opportunities presented by the referrals to advance his fraudulent undertaking does not cast back onto Cooper any responsibility for that undertaking. United States v. Falcone, 311 U.S. 205 (1940).

The government makes much of the various loans Cothran extended to Cooper. It urges a presumption that the loans represented payment for referrals or Cooper's share of the fraudulent earnings. We cannot draw the presumed conclusion. Cooper denied ever receiving monies for making referrals to Cothran. Cothran testified that the only substantial sum involved was an advance against the anticipated proceeds from a claim made by Cooper, and that the advance was fully repaid upon settlement of the claim. Other loans made by Cothran to Cooper were in small amounts and by check. All of the loans were repaid. The evidence of repayment was not questioned or contradicted.

Repayment of the loans by itself, refutes the inference which the prosecution desired the jury to draw from the advancement of monies.

Likewise, the most significant item of evidence alleged by the government to justify a finding of guilty knowledge on Cooper's part does not provide the desired justification. On November 26, 1976, Cooper was driving a tow truck which was rear-ended by another vehicle. Cooper subsequently contacted Cothran to represent him on the accident claim. While the government now states that "it was for the jury to determine if the accident was staged," the government had not asked the jury to infer that the accident was staged. Neither was actual proof of fabrication offered. On the contrary, the government's contention at trial was that the resulting claim was inflated. In closing, the government's attorney said, "Now, again, we say that this is a situation where the physical facts simply do not justify the injuries that were claimed and the claim that was filed with

the insurance company." The evidence, however, does not sustain the argument.

The testimony showed that the other driver admitted liability; that Cooper refused to settled at the scene because the tow truck belonged to his employer; and that Cooper's claim was bona fide. Cooper did not visit Dr. Harrison, the physician for the scheme, but instead went to Dr. Thurmond Walker for treatment of the injuries he sustained in the automobile accident. The loss of wage statements filed by Cooper were shown to be authentic. The government would have us believe that the injuries claims were not consistent with the details of the wreck. However, the mere fact that the tow truck suffered minimal damage does not compel the conclusion that Cooper suffered only minimal injuries. The car which struck the more solid truck did sustain approximately $170.00 worth of damage. Cooper's injuries are consistent with the impact of the accident.

Finally, Cooper's choice of Cothran to represend him on the claim indicates nothing more than a continuation of an established attorney-client relationship in which Cooper was comfortable due to his satisfaction with Cothran's prior work.

The evidence produced against Cooper shos behavior wholly consistent with innocence. In no way does it indicate that the gist of the scheme to defraud was brought to his knowledge. Cf. United States v. Perkal, supra, 530 F.2d at 606; Reistroffer v. United States, 258 F.2d 379, 395 (8th Cir. 1958), cert. denied, 358 U.S. 927 (1959).

IV. Motions for Severance

Dr. Harrison contends that the district court's denial of his motions for severance and separate trial was reversible error. The prejudice is said to arise from the antagonism between Harrison's defense and that of Cothran which precluded the introduction of allegedly crucial evidence for Harrison, the

testimony of Dot Raven. Harrison also maintains that the prejudice could not be cured by cautionary instructions to the jury.

As a general rule, persons jointly indicted should be tried together and the question of severance is one which remains within the sound discretion of the trial judge. United States v. Shuford, 454 F.2d 772 (4th Cir. 1971); Hall v. United States,168 F.2d 161 (D.C. Cir. 1948). The peculiar facts of the case must demonstrate a substantial degree of prejudice so as to result in a miscarriage of justice for us to disturb the determination of the district court. United States v. Becker, 585 F.2d 703, 706 (4th Cir. 1978); United States v. Jakubik, 585 F.2d 667, 674 (4th Cir. 1978); United States v. Shuford, supra.

Harrison relies principally upon our decision in Shuford where the testimony of a co-defendant would have served to exonerate Shuford in a separate trial. The case involved the crucial fact of Shuford's instructions to

one Gene H. Long about which both Shuford and Long testified. The only other potential witness with direct knowledge was Shuford's co-defendant who, absent severance, refused to testify. Since the situation became a credibility contest, since the co-defendant's testimony was of vital importance to Shuford, and since no undue burden on judicial administration would result, we determine that severance should have been granted. 454 F.2d at 777,777 N.5. Shuford involved a unique factual setting. Accordingly, we have stressed the importance of ascertaining with a "reasonable probability" that exculpatory testimony will be forthcoming at a separate trial. United States v. Jakubik, 585 F.2d at 574-575 (testimony at issue "had less than a pivotal bearing on Jakubik's guilt or innocence"); United States v. Becker, 585 F.2d at 707 (testimony of co-defendant only conditionally offered).

Here the standard for severance simply has not been met. The testimony sought

was not that of a co-defendant. Neither was it crucial to Harrison's case. The stipulated testimony, not received into evidence on account of Cothran's objection, did not contradict the unfavorable evidence introduced against Harrison. Taken at its strongest, the stipulation at most somewhat bolstered Harrison's own testimony. Moreover, there was no guarantee that Raven would be available to testify at a separate trial or that the government would stipulate to her testimony. In addition, the trial was long and complicated, with many witnesses and evidence which related to several defendants. Consequently, concerns over efficiency in judicial administration also weigh against granting severance. See United States v. Shuford, 454 F. 2d at 775-776.

Similarly, Harrison's claim that severance was required because his and Cothran's defenses were antagonistic must fail. "Antagonistic defenses do not per se require severance, even if the defendants are hostile

or attempt to cast the blame on each other." United States v. Becker, supra, 585 F.2d at 707. "It [was] not so much that the defenses were antagonistic to each other as it is that the evidence was antagonistic to the defenses." United States v. Becker, supra, 585 F.2d at 707; United States v. Frazier, 394 F.2d 258, 261 (4th Cir. 1968), cert. denied, 393 U.S. 984 (1968). The trial judge did not abuse his discretion in denying Harrison's motions for severance and separate trial.[14]

Johnson also moved for a severance and separate trial. Prejudice allegedly arose from a "spill-over" effect resulting from the vast evidence introduced against the five defendants on twenty counts; the"cross-fire" situation for Johnson resulting from the allegedly antagonistic defenses of Cothran and

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14 Since we find no harm in the denial of severance, we need not address Harrison's assertion that the cautionary instructions given to the jury could not cure the allegedly erroneous joinder.

and Harrison; and the presentation of numerous witnesses regarding incidents in which Johnson had no participation; Johnson assets the total effect was one of confusion and prejudice. It has long been the law that "when many conspire, they invite mass trial by their conduct." Kotteakos v. United States, 328 U.S. 750, 773 (1946); United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973). Johnson has failed to show a clear abuse of discretion. For much of the reasons stated above concerning Harrison's demands for severance and separate trial, we find no abuse of discretion in the dential of Johnson's motion for like relief.

V. Johnson Conviction

Johnson further alleges that there was insufficient evidence to sustain his conviction. However, the evidence did suffice to persuade the jury of Johnson's guilt. It showed that there was a kickback scheme between Johnson and area police officers designed to channel wreck victim customers to Johnson. Johnson admitted

having recommended Cothran to his customers numerous times, a fact that Cothran confirmed. Cothran further states that he gave free legal representation to Johnson in return for Johnson's recommending client to him.[15] Government witness Lee Dukes testified that Johnson told him to make a false claim that he had been injured in an accident and referred him to Cothran. Another government witness, Sandra Hursey, testified that Johnson called Cothran and that she was referred to Cothran by Johnson. Government witness Harvey Earl Kennedy was sent by Cothran to Johnson, and Johnson taught him how to use a police scanner in order to recuit accident victims for the scheme. Amply evidence existed to support the jury finding that Johnson knowingly participated in the scheme.

Johnson's next allegation of error concerns the admission of the testimony of Ira C. Carney, a former Columbia, South Carolina,

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15 Johnson's denial the jury was free to disregard.

police officer. The testimony showed that Johnson had paid Carney in return for Carney's referral of accident wrecks to Johnson. Carney stated he received fifteen dollars per wreck and that payment was made eight or nine times. The payments occurred within the time frame of the indictment. The evidence was offered to prove knowledge and preparation of, and participation in, the scheme. As such, the testmony was properly admitted under Fed. R.Evid. 404(b). United States v. Masters, 622 F.2d 83, 87 (4th Cir. 1980); United States v. Smith, 446 F.2d 200 (4th Cir. 1971). Johnson asserts that the testimony was prejudicial because the government implied by it that Johnson had bribed an officer. However, Johnson admitted making the payments to Carney and the inference of bribery to further the fraudulent scheme is not an unreasonably one.

Johnson's final complaint is that his not guilty plea and the loss of wages signed by him were not properly authenicated

and admitted under Fed. R. Evid. 901. Contrary to Johnson assertions, both documents were properly admitted by the trial court.

The trial court admitted the loss of wages form contingent on proof of authenticity. The authenticity issue associated with the proof of loss of wages form was properly one, under the evidence adduced, for the jury to resolve. The court admitted Johnson's not guilty plea as a handwriting sample with which the jury could compare the loss of wages form in determining whether Johnson had signed that form. Johnson and his wife had testified that the wife filled out and signed Johnson's name to the form.

Whether Johnson had signed the form himself was an issue for the jury's determination. United States v. Goichmen, 547 F.2d 778, 784 (3d Cir. 1976). The jury is competent to compare the writing whose authenticity is challenged with a genuine specimen of the alleged author's handwriting and to draw its

own conclusion in the absence of expert opinion. Fed. R. Evid. 901(b) (3); United States v. Woodson, 526, F.2d 550, 551 (5th Cir. 1975); see Strauss v. United States, 311 F.2d 926, 932 (5th Cir. 1963); Goins v. United States, 99 F. 2d 147, 151 (4th Cir. 1938). It is well settled that a "party's signature to a pleading, motion or other procedural instrument on file in the court can be used as a specimen without further proof of its genuineness." 5 J. Weinstein & M. Berger, Weinstein's Evidence §901(b)(3) [2] (1978). Johnson does not dispute that this signature appeared on his not guilty plea. The plea was properly admitted, 28 U.S.C. §1731. Consequently, so was the loss of wages form. No error occurred.

VI. Richardson

Richardson contends that the government failed to fully comply with Brady v. Maryland, 373 U.S. 83 (1963). The specific items Richardson maintains should have been provided to his counsel prior to trial are (1) the

statement of Cothran's defense witness Drigger Scipio and (2) the statements of government witnesses Hopkins, Richardson, and Williams. Neither incident contravenes Brady's prohibition against "the suppression by the prosecution of evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Here, regardless of the nature of the prior statements, no Brady problem arose. The facts related in the statement were not suppressed, In both cases the material was furnished to counsel for Richardson in time for cross-examination. Indeed, the government used the Scipio statement in the course of its own cross-examination of Scipio. "As Long as ultimate diclosure is made before it is too late for the defendants to make use of any benefits of the evidence, Due Process is satisfied." United States v. McPartlin. 595 F.2d [1321], 1345-1347 (7th Cir. 1979); United

States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1979).

Richardson's final allegation of error concerns the admission of his own written statement, an admission which Richardson contends contravences Miranda v. Arizona, 384 U.S. 436 (1966). The trial court held a hearing on the question of whether the statement was voluntary at which Richardson testified. Having conducted a full and fair hearing the trial judge found that the statement had been voluntarily. Finding no error in his determination, we conclude that Richardson statement was properly admitted.

Accordingly, the conviction of Cooper is reversed, without a new trial, the evidence having been legally insufficient to sustain a conviction. As to all other defendants, the convictions are affirmed.